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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH BROWN,

Petitioner,

No. CIV S-09-1321 GEB CHS

vs.

KATHLEEN DICKINSON,

Respondent.

FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner Brown, a state prisoner, proceeds pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner stands convicted of attempted willful, deliberate, and premeditated murder and assault with a deadly weapon in the Solano County Superior Court, case number VCR174764, for which he is currently serving an indeterminate prison term of 23 years to life.

II. BACKGROUND¹

The victim, Sandeep Sharma, worked at the Bonfare Market in Vallejo. On August 14, 2004, just after 6:00 a.m., petitioner entered the Bonfare Market along with a man in

¹ See *People v. Brown*, No. L 2516459, 2008 WL 2516459, at 1-2 (Cal. App. 1 Dist., 2008).

1 a wheelchair. Sharma was alone in the store. He recognized petitioner and the other man as
2 prior customers.

3 Sharma was at the cash register in the front of the store. Petitioner and the other
4 man went to the refrigerated coolers in the back of the store. The man in the wheelchair asked
5 Sharma about “the Arizona grape drink.” Sharma told him he didn’t carry it, but did carry “the
6 Mystic grape drink,” which was kept in the cooler at the left corner of the back of the store. The
7 man in the wheelchair said he couldn’t find the Mystic grape drink and asked Sharma to help
8 him. Sharma walked towards the left rear corner of the store, passing petitioner who was
9 standing at the center of the rear wall of coolers. Petitioner “was just standing there looking
10 towards the refrigeration area, towards the coolers.” Petitioner had not said anything to Sharma.

11 After Sharma passed petitioner, he opened the refrigerator door to retrieve the
12 Mystic grape drink. Then petitioner grabbed him from behind and stabbed him on the right flank,
13 above his right hip and towards his back. Sharma felt a sharp pain. Sharma fell to the ground
14 and petitioner fell on top of him. Petitioner grabbed Sharma and the two men wrestled. Sharma
15 was trying to push petitioner away because he was afraid petitioner would stab him again. While
16 they wrestled, petitioner demanded the store’s surveillance tape in a loud aggressive voice.

17 Petitioner got up and moved to the right rear of the store. Sharma got up.
18 Petitioner ran toward him. Sharma ran to the front of the store and fell on the Pepsi display.
19 Petitioner came to within two feet of Sharma with a knife in his hand. A customer who had just
20 entered the store told petitioner to stop. Petitioner did not try to stab Sharma again.

21 Petitioner walked out of the store. So did Sharma. The man in the wheelchair
22 told Sharma he would call 911.² Sharma stood outside with petitioner for one to two minutes,
23 during which petitioner did not say anything to Sharma or try to threaten, stab or otherwise attack
24 him. Petitioner stood quietly. Sharma went back inside the store. Petitioner walked away.

25
26 ² Police later determined that the man in the wheelchair was not involved in the crime.

1 At trial, the store surveillance tape was played for the jury, and accurately
2 depicted the events described by Sharma.

3 On cross-examination, Sharma testified he had seen petitioner in the store before,
4 but had never had any problems with him. He also testified that petitioner did not punch him or
5 strike him, and never threatened to kill him.

6 Sharma's knife wound was about three inches deep, and required surgery and
7 stitches. It was just two inches from the aorta and the vena cava. As a result of the wound,
8 Sharma cannot stand for a long time, and feels "numbness and pain and pressure in [the] area."

9 A Vallejo police detective arrested petitioner, without incident, in Fairfield on
10 August 17, 2004. After being told his *Miranda* rights, petitioner agreed to make a statement.
11 Petitioner said he entered the Bonfare Market in the early morning of August 14, 2004, "tripped
12 out," and stabbed the victim. He used a fixed-blade knife about four-to-six inches long.

13 Petitioner told the detective that he had a dispute with Sharma over change from a
14 purchase about a week before the stabbing. He initially said the dispute was the reason for the
15 stabbing, but "[u]ltimately he explained that he had no reason for the stabbing; that he just
16 tripped out, or blanked out." Petitioner did not tell the detective that he wanted or intended to
17 kill Sharma.

18 Petitioner also told the detective he had driven to the store and parked about a
19 quarter-mile away. He did not say why he parked so far from the store. He said he threw his
20 knife in a swamp after he left the market, while walking to his car.

21 Petitioner did not testify or call any witnesses. In closing argument to the jury,
22 defense counsel conceded that defendant assaulted Sharma with a knife, but argued that
23 defendant did not intend to kill him and should not be convicted of attempted murder.

24 A jury convicted petitioner of attempted willful, deliberate, and premeditated
25 murder and assault with a deadly weapon or by any means likely to produce great bodily injury.
26 On appeal, petitioner claimed instructional error and ineffective assistance of counsel. The latter

1 claim was pursued in a habeas corpus petition, presenting facts outside the record. The
2 California Court of Appeal, First District, affirmed the judgment and sentence. A petition for
3 review to the California Supreme Court was denied. Petitioner sought habeas corpus relief in
4 state court which was likewise denied.

5 III. GROUNDS FOR RELIEF

6 The petition presents two grounds for relief:

7 Ground One: Trial Counsel rendered ineffective assistance of counsel by failing to
8 present evidence that petitioner had a mental disorder rendering him incapable of forming the
9 intent to kill;

10 Ground Two: The trial court erred in violation of due process when it rejected the
11 defense's proposed modified version of pattern jury instruction CALJIC No. 8.66 on the
12 elements of attempted murder.

13 IV. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

14 An application for writ of habeas corpus by a person in custody under judgment of
15 a state court can be granted only for violations of the Constitution or laws of the United States.

16 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v.*
17 *Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)).

18 This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to,
19 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521

20 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under

21 AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in
22 state court proceedings unless the state court's adjudication of the claim:

23 (1) resulted in a decision that was contrary to, or involved an
24 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

25 (2) resulted in a decision that was based on an unreasonable
26 determination of the facts in light of the evidence presented in the
State court proceeding.

1 28 U.S.C. § 2254(d); *see also* *Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v.*
2 *Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

3 This court looks to the last reasoned state court decision in determining whether
4 the law applied to a particular claim by the state courts was contrary to the law set forth in the
5 cases of the United States Supreme Court or whether an unreasonable application of such law has
6 occurred. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919. The
7 state court’s factual findings are presumed correct if they are not rebutted with clear and
8 convincing evidence. 28 U.S.C. § 2254(e)(1); *Taylor v. Maddox*, 336 F.3d 992, 1000 (9th Cir.
9 2004). It is the habeas corpus petitioner’s burden to show the state court’s decision was either
10 contrary to or an unreasonable application of federal law. *Woodford v. Visciotti*, 537 U.S. 19,
11 123 S. Ct. 357, 360 (2002).

12 V. DISCUSSION

13 A. Ground One: Ineffective Assistance of Counsel

14 Petitioner claims that he was denied his Sixth Amendment right to the effective
15 assistance of counsel when counsel did not present a defense based on mental disease, defect, or
16 disorder which could have negated his ability to form the specific intent to kill, a necessary
17 element of attempted murder, or demonstrated that he did not premeditate or deliberate the
18 attempted murder.

19 Petitioner was represented by William Pendergast at trial. Prior to Pendergast’s
20 appointment, Dr. Purna Datta, clinical psychologist, evaluated petitioner and generated an eight
21 page report which was provided to the previous attorney of record. (Clerk’s Transcript on
22 Appeal (“CT”) at 274-281.)

23 In pertinent part, Dr. Datta’s report indicated that petitioner claimed to have heard
24 voices in his head since he was 13 years old and that he reported that he stabbed the victim
25 because he “panicked and lost control of self.” (CT at 274.) Petitioner also reported sleep
26 problems and the use of methamphetamine and ecstasy when under stress. It was noted that

1 petitioner's mother suffers from severe mental illness for which she had been hospitalized many
2 times. Dr. Datta noted that petitioner had been previously charged in 1994 with a similar offense
3 that also appeared to be a robbery attempt and in both cases, he did not take any money from the
4 store. Dr. Datta concluded that petitioner's "report/claim of auditory hallucinations will need to
5 be investigated further" and that petitioner should be further evaluated to decide "if he had been
6 mentally insane at the time of the offense." (CT at 280.)

7 Previous counsel obtained a second confidential psychological evaluation.

8 Carlton Purviance, Ph.D., observed, in pertinent part:

9 At those times when the defendant was not asked simple direct
10 questions, he endeavored to steer the subject toward convincing me
11 he was suffering from a major mental illness. He spontaneously
12 introduced a number of signs and symptoms he thought would
13 indicate mental illness, and he volunteered that he: "Sees things
14 and I have thoughts of people getting hurt... I do things at night and
15 the next morning I wouldn't remember them... I kept telling people
16 nothing was wrong with me but I knew there was.... As I am sitting
17 here talking to you the voices are telling me to stop talking to you...
18 The voices are telling me to say foul things... I have visions and I
19 see things like death and people getting hurt... I don't know why I
20 am seeing all this stuff... I've been seeing it for years..."

21 The defendant pretended to have great difficulty answering the
22 simplest of questions (e.g. How old is your sister?) While he
23 encountered no difficulty whatsoever when asked to describe the
24 symptoms of his (feigned) mental illness. He was able to specify
25 the exact drug and dose of his psychotropic medication at the jail:
26 "Thorazine 200mg." To the prescribing psychiatrist at the jail he
reported that the Thorazine was benefitting him, yet to me he
complained that his (alleged psychotic) symptoms were not helped
by this drug...

(See Respondent's Exhibit E-1.)

22 Dr. Purviance noted that petitioner was high on methamphetamine when he
23 committed this offense, and that he had been using the drug on a daily basis when he previously
24 committed the similar offense against another store clerk. Dr. Purviance concluded:

25 The only psychological issue that I am confident of here is the
26 defendant's significant methamphetamine addiction. In my
opinion he is malingering a psychotic disorder, and he is not

1 unfamiliar with the symptoms of paranoid schizophrenia since his
2 mother has suffered from that disorder for “years”...

3 With regard to psychiatric defense issues, even if the defendant
4 was toxic and psychotic from the prolonged use of
5 methamphetamine when he entered the store, there is the problem
6 of his voluntary intoxication. Moreover, Mr. Brown’s actions at
7 the time (his interest in the surveillance tape, his flight from the
8 scene, and his throwing away of the knife) all indicate the presence
9 of mens rea or consciousness of guilt.

10 (See Respondent’s Exhibit E-1.)

11 Pendergast was aware of and had reviewed both reports. In a letter to petitioner’s
12 appellate counsel, the contents of which were later sworn to be true by declaration which is also
13 before this court, Pendergast wrote that he investigated the possibility of a defense of insanity or
14 a defense to negate specific intent, but rejected it because of the voluntary intoxication issue and
15 because of Dr. Purviance’s report. Pendergast discussed these issues with petitioner and
16 petitioner agreed to forego the defense.³ Pendergast explained:

17 Raising a mental defense presented a number of additional
18 potential problems in this case. I was concerned that if we raised a
19 mental defense it would allow the prosecution to rebut any such
20 defense with charges of malingering or lying. Such information
21 outweighed the potential benefits of a mental defense. Further, the
22 prosecution sought to introduce evidence of Defendant’s previous
23 attempted murder which occurred at the very same convenience
24 store about a decade earlier wherein he shot the clerk in the face
25 with no provocation. I was able to exclude this evidence from trial.
26 This other crimes evidence was nonetheless troubling for a variety
of reasons. If we tried to raise a mental defense now it would beg
the question as to why he did not raise a mental defense then, given
his description of his disease’s genesis to the various doctors in the
present case. Raising a mental defense could require Mr. Brown to
take the stand and/or otherwise open the door to allow the 1101(b)
evidence sought by the Prosecution. The risk of Mr. Brown
appearing to be a liar, or the potential introduction of the 1101(b)
evidence of the prior attempted murder outweighed the potential
benefit of raising a mental defense in this trial.

There were other strategic reasons for this choice as well. The

³ Petitioner has denied telling Pendergast that he did not want to present evidence of
mental illness. *People v. Brown, supra*, at 7.

1 facts, photographs, and videotape all supported my argument that
2 Mr. Brown did not have the intent to kill because if he wished to
3 kill the clerk, he had every opportunity to do so. This defense
allowed me to argue the intent to kill issue without the dangers of
raising a mental defense.

4 (*See* Respondent’s Exhibit E-1.)

5 Relying on this evidence, the state appellate court rejected petitioner’s claim of
6 ineffective assistance of counsel, reasoning:

7 Pendergast had one report suggesting that defendant *might* be
8 mentally ill, and a second report stating in clear terms that its
9 author believed defendant to be faking mental illness. Pendergast
10 was concerned about introducing defendant’s voluntary drug
11 intoxication to the jury. Pendergast had obviously viewed the
12 videotape (which we have not) and believed, as a tactical matter,
13 that a better defense was the one he put forth: that the facts and
14 circumstances did not show an intent to kill.

15 Pendergast’s tactical decisions were reasonably competent under
16 the circumstances of this case. Given the facts of the assault and
17 the Purviance report, we cannot say that it was unreasonable to
18 cease further investigation of a mental defense or to fail to present
19 evidence of mental illness at trial. Defendant has not made a *prima*
20 *facie* case of ineffective counsel.

21 *People v. Brown, supra*, at 8.

22 To demonstrate a denial of the Sixth Amendment right to the effective assistance
23 of counsel, a petitioner must establish that counsel’s performance fell below an objective
24 standard of reasonableness, and that he suffered prejudice from the deficient performance.

25 *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Prejudice is found where there is a
26 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
would have been different. *Id.*

“Surmounting *Strickland’s* high bar is never an easy task,” and review under the
AEDPA is doubly deferential. *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (citing *Padilla*
v. Kentucky, 130 S. Ct. 1473, 1485 (2010)). The relevant question is whether there is any
reasonable argument that counsel satisfied *Strickland’s* deferential standard. *Harrington*, 131 S.
Ct. at 788.

1 Under this standard, the claim fails. A reasonable argument certainly exists that
2 Pendergast's decision was tactical, strategic, and well within the wide range of competent
3 representation. Petitioner fails to overcome "the presumption that, under the circumstances, the
4 challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal
5 quotation omitted). "It is [] an acceptable trial strategy to choose not to call psychiatrists to
6 testify when they can be subjected to cross-examination based on equally persuasive psychiatric
7 opinions that reach a different conclusion." *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir.
8 1990). Strategic decisions are "virtually unchallengeable." *Id.* at 690; *see also Gerlaugh v.*
9 *Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) ("Counsel knew about the evidence and looked into
10 it, but chose as a tactical matter not to use it. A reasonable tactical choice based on an adequate
11 inquiry is immune from attack under *Strickland*..."). No relief is available.

12 B. Ground Two: Instruction with CALJIC No. 8.66

13 The jury was instructed with CALJIC No. 8.66 on the elements of attempted
14 murder. Petitioner claims that he was deprived of his constitutional rights to due process and a
15 fair trial when the trial court declined to modify the instruction to emphasize that the element of
16 intent to kill was not established merely by the fact that the victim was stabbed. Petitioner
17 contends that this modification was necessary to focus the jury's attention on the defense theory
18 of the case.

19 As given, CALJIC No. 8.66 instructed the jury:

20 In order to prove attempted murder, each of the following elements
21 must be proved:

- 22 1. A direct but ineffectual act was done by one person towards
killing another human being; and
- 23 2. The person committing the act harbored express malice
24 aforethought, namely, a specific intent to kill unlawfully another
human being.

25 In deciding whether or not such an act was done, it is necessary to
26 distinguish between mere preparation, on the one hand, and the
actual commencement of the doing of the criminal deed, on the

1 other. Mere preparation, which may consist of planning the killing
2 or of devising, obtaining, or arranging the means for its
3 commission, is not sufficient to constitute an attempt. However,
4 acts of a person who intends to kill another person will constitute
5 an attempt where those acts clearly indicate a certain, unambiguous
6 intent to kill. The acts must be an immediate step in the present
7 execution of the killing, the progress of which would be completed
8 unless interrupted by some circumstances not intended in the
9 original design.

6 (CT at 216.) And further:

7 In the crime charged in Count One, namely, ATTEMPTED
8 MURDER, there must exist a union or joint operation of act or
9 conduct and a certain specific intent in the mind of the perpetrator.
Unless this specific intent exists the crime to which it relates is not
committed.

10 (CT at 216.)

11 The defense's requested proposed addition would have instructed:

12 Specific intent to kill unlawfully is a necessary element of
13 attempted murder and the prosecution must prove beyond a
14 reasonable doubt that the defendant harbored such a requisite
15 intent. Intent to kill unlawfully can not be inferred solely from the
16 commission of another dangerous crime such as assault with a
17 deadly weapon with the intent to cause great bodily injury in
18 violation of Penal Code section 245(a)(1). In addition to proving
19 that the defendant committed assault with a deadly weapon with
20 the intent to cause great bodily injury in violation of Penal Code
21 section 245(a)(1) the Prosecution must present other independent
22 evidence which, directly or by solid inference, proves beyond a
23 reasonable doubt that defendant intended to kill.

19 (CT at 186.)

20 On direct review, the California Court of Appeal rejected the claim of error,
21 concluding that "the requested pinpoint instruction was duplicative of the other instructions on
22 the elements of the charged offenses..." *People v. Brown, supra*, at 3.

23 Petitioner's claim of instructional error does not raise a cognizable federal claim
24 unless the error, considered in context of all the instructions and the trial record as a whole, "so
25 infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*,
26 502 U.S. 62, 71-72 (1991); *see also Henderson v. Kibbe*, 431 U.S. 145, 152-55, n.10 (1977);

